

1 valuation for Versus, have you?

2 A Correct.

3 Q Let me run through one more topic
4 with you.

5 May I approach, Your Honor?

6 JUDGE SIPPEL: Yes, you may.

7 BY MR. SCHMIDT:

8 Q Do you recall, Mr. Gerbrant -- and
9 can you see that? You are the most important
10 person to see that, so I may have to reorient
11 this a little bit.

12 A I can't, actually.

13 Q Okay. Well, that is not fair to
14 you.

15 JUDGE SIPPEL: You erased the
16 bracket for the Final Four, I think you -- you
17 can still see that.

18 MR. SCHMIDT: Exactly. It didn't
19 turn out so well for me.

20 BY MR. SCHMIDT:

21 Q Do you see -- I put dates here.
22 What I would like to do is just walk very

1 quickly through the timeline, if you are okay

2 with that. Is that okay?

3 A Fine.

4 Q And do you recall that in August
5 2004 that is when Comcast signed the deal with
6 the NFL Network to carry the NFL Network
7 before it had the eight games on it? Do you
8 recall that? I will represent to you that
9 that is true. I don't think it is contested.

10 A Okay.

11 Q And do you recall that Comcast
12 paid a flat rate of [REDACTED] for this?

13 A I do recall that, yes.

14 Q Or for that network, I'm sorry.

15 A Correct.

16 Q And the [REDACTED] applied -- the
17 [REDACTED] per year, right?

18 A Yes.

19 Q The [REDACTED] applied if Comcast
20 showed the games to 500 people or to all 24
21 million of its subscribers, right?

22 A Did you say "showed the games"?

1 Q Put the games on a tier where they
2 could be viewed by, say, only 500 versus all
3 24 million. Showed the network. I'm sorry,
4 I keep misspeaking.

5 Let me ask the question again.
6 That flat [REDACTED] fee applied regardless
7 of whether the network was available to all of
8 Comcast subscribers or only a portion of
9 Comcast subscribers.

10 A That is correct.

11 Q But if you take that [REDACTED],
12 and you divide it out over the number of
13 subscribers who were on D2 -- that is where
14 the network was carried, correct?

15 A Yes.

16 Q And divide it out over the number
17 of subscribers on D2 -- I am going to just
18 give you a range, because it changed over time
19 -- it was about [REDACTED], does that seem
20 right?

21 A I seem to recall seeing
22 calculations in that range, yes.

1 Q I am talking about [REDACTED],
2 and you are trying to trade places with Mr.
3 Toscano. That is what it started at in 2004,
4 right?

5 JUDGE SIPPEL: That is a range?

6 MR. SCHMIDT: That is the range,
7 because it changed as they got more viewers.

8 JUDGE SIPPEL: Okay.

9 THE WITNESS: No. Actually, that
10 is not correct.

11 BY MR. SCHMIDT:

12 Q Okay. What did it start at?

13 A Well, he said viewers. Viewers --

14 Q Subscribers.

15 A Okay. That I can agree with.

16 Q Okay. And when was the NFL
17 Network tiered?

18 A My recollection -- I am going to
19 say that was in -- I think we just said April
20 2007, I believe is the date, so -- I am not an
21 expert on the timeline.

22 JUDGE SIPPEL: Well, that is all

1 right. You don't have to -- just answer the
2 question, and it is perfectly proper to rely
3 on the date that counsel gave you.

4 BY MR. SCHMIDT:

5 Q And within that -- I'm sorry --
6 that range, this [REDACTED], didn't
7 change from 2004 up to when the network was
8 tiered in 2009, at least as applied to the
9 network without the eight games. There is a
10 surcharge issue I will come back to, but --

11 A Well, you are asking me to
12 interpret the contract, and I am not sure that
13 is my role here. But it --

14 JUDGE SIPPEL: He is not asking
15 you to do that. Just answer his question.

16 THE WITNESS: Okay. As far as I
17 know, that is correct.

18 BY MR. SCHMIDT:

19 Q Now, you are aware, aren't you,
20 that Comcast at some point in this 2005/2006
21 period -- Comcast made an effort to purchase
22 the eight-game package, correct?

1 A Yes. Yes, I am aware that
2 negotiations -- I heard last year that -- or
3 I heard yesterday that it was somewhat of a
4 long process, but yes.

5 Q Okay. And I will represent to you
6 that it became intense, that that proposal
7 document we looked at yesterday came from
8 October 2005. Do you remember hearing that
9 yesterday?

10 A Yes.

11 Q And do you remember that there was
12 talk of Comcast giving the NFL [REDACTED] in
13 value for the games?

14 A Yes, I do.

15 Q That is supposed to be October
16 2004 -- October 2005. And you also heard and
17 saw documents that to pay for that Versus was
18 going to have to increase the rates that it
19 charged Comcast and other cable companies that
20 carry Versus, right?

21 A Yes. There was some modeling of a
22 surcharge, yes.

1 Q Yes. And that modeling went up to
2 upwards of [REDACTED], right? And, again, I am
3 trying to move through it quickly without --

4 A Yes. No, I -- yes.

5 Q That was [REDACTED] per sub, per
6 subscriber.

7 A Yes.

8 Q Okay. And they made that offer in
9 November, right?

10 A Okay.

11 Q I misspoke. They made that offer
12 in October.

13 A Okay.

14 JUDGE SIPPEL: Of 2005.

15 MR. SCHMIDT: 2005.

16 BY MR. SCHMIDT:

17 Q They reiterated that offer in
18 November 2005, correct?

19 A I believe that is what I heard,
20 yes.

21 MR. CARROLL: Your Honor, I would
22 just note an objection. This witness is not

1 called as an expert on any of these matters
2 that we have been doing here, and I don't know
3 why we are doing them with this expert who was
4 called on certain issues.

5 MR. SCHMIDT: Your Honor, he is
6 being offered as a valuation expert. We think
7 this is highly relevant.

8 JUDGE SIPPEL: Did he do this
9 evaluation? Did you do any --

10 THE WITNESS: I did not.

11 JUDGE SIPPEL: Oh, you didn't do
12 it. Do you want him to do it now?

13 MR. SCHMIDT: No. I want him --

14 JUDGE SIPPEL: Do you want to pay
15 him for it?

16 (Laughter.)

17 MR. SCHMIDT: I certainly don't
18 want to pay him for it.

19 JUDGE SIPPEL: Well, you know, we
20 have got to -- you know, we have to cut it
21 some place. How much more have you got?

22 MR. SCHMIDT: Your Honor, I have

1 got 15 minutes.

2 JUDGE SIPPEL: Of this?

3 MR. SCHMIDT: Probably less.

4 JUDGE SIPPEL: Of this?

5 MR. SCHMIDT: This is all I have,
6 Your Honor.

7 JUDGE SIPPEL: No. Fifteen
8 minutes of this is a waste of time. I am
9 going to --

10 MR. SCHMIDT: I will stop, Your
11 Honor.

12 JUDGE SIPPEL: Okay. Anything on
13 redirect or anything on --

14 MR. SCHMIDT: Well, can I just ask
15 the witness one question?

16 JUDGE SIPPEL: Yes.

17 BY MR. SCHMIDT:

18 Q Have you come up with a price for
19 the NFL Network?

20 A No.

21 MR. SCHMIDT: Okay.

22 JUDGE SIPPEL: Thank you. I am

1 sorry to cut you off, but, you know, time is
2 of the essence here. And you all understand
3 that, I hope.

4 MR. SCHMIDT: Yes.

5 JUDGE SIPPEL: All right. Anybody
6 have anything more of this witness? Mr.
7 Schonman?

8 MR. SCHONMAN: Yes. Just a few,
9 Your Honor.

10 JUDGE SIPPEL: That is okay.

11 BY MR. SCHONMAN:

12 Q Sir, my name is Gary Schonman. I
13 am co-counsel for the FCC's Enforcement
14 Bureau. Good morning.

15 A Good morning.

16 Q Early on in your direct oral
17 testimony this morning you discussed the
18 factors that you believe are relevant in
19 determining why the NFL licensing fees are too
20 high, is that correct?

21 A Yes.

22 Q I think it was a list of about

1 five criteria, five factors?

2 A Yes.

3 Q One of them, I think the first
4 one, was limited exclusive content.

5 A Yes.

6 Q And if I am mischaracterizing your
7 testimony, please correct me. You had
8 indicated that someone could put up rabbit
9 ears and get these programs for free.

10 A That is correct, in their home
11 markets.

12 Q And that was the clarification
13 that I was curious about. In other words, in
14 Richmond, Virginia, for example, a person can
15 get a local game -- well, let me use
16 Washington, D.C. A Washington, D.C. resident
17 can get a Washington, D.C. game, but he may
18 not be able to get an out-of-town game, is
19 that correct, using rabbit ears?

20 A That is correct.

21 Q Does that affect this element as a
22 factor in your consideration?

1 JUDGE SIPPEL: What element? What
2 element are you --

3 MR. SCHONMAN: The element that
4 the NFL carries -- has limited exclusive
5 content. As I understand it, in justification
6 of that element, he indicated that you can get
7 these programs by putting up rabbit ears.

8 BY MR. SCHONMAN:

9 Q My question went to whether you
10 can get all of the programs by putting up
11 rabbit ears, or only certain programs.

12 A Well, I was relating specifically
13 to the fact that in the home markets, the home
14 team markets, these games are available for
15 free over the air.

16 Q But not all of the games, for
17 example, of the eight-game package.

18 A Well, all of the games are
19 available -- I think assuming a sell-out -- in
20 all of the home team markets. But they are
21 not available -- you are right, they are not
22 available in all of the markets.

1 Q Thank you. The second item that
2 you listed was that there is a limited unique
3 -- limited unique programming. Was that the
4 second factor?

5 A Yes.

6 Q What did you mean by that?

7 A Well, first of all, I meant that
8 programming about the NFL is available on many
9 other channels. It is available on TV
10 stations across the country. I mentioned the
11 fact that virtually every market where there
12 is a team there is also local programs by the
13 team, by the coaches, in some cases by the
14 players. There is not a dearth in this
15 country of programming about the NFL and NFL
16 games.

17 Q I see. So this program is
18 available in a myriad of sources, outlets so
19 to speak?

20 A Yes. You don't have to go to the
21 NFL Network to find football programming. You
22 have got it all over the place.

1 Q I understand. Thank you. Let me
2 ask you this question.

3 JUDGE SIPPEL: So what does that
4 support? What conclusion does that support?

5 THE WITNESS: Well, if you are --
6 that the price was excessive, that --

7 JUDGE SIPPEL: All right. Thank
8 you. Okay. That's all right.

9 BY MR. SCHONMAN:

10 Q But let me ask you a question with
11 regard to this unique programming that is
12 available from a number of different outlets.
13 The NFL Network, as I understand it, has
14 packaged lots of football-related information
15 that although it may be available at a lot of
16 -- from a lot of different outlets is -- does
17 the packaging in one place, on one channel,
18 does that have any value?

19 JUDGE SIPPEL: Are you talking
20 about non-games? I mean, non-game
21 programming?

22 MR. SCHONMAN: That is correct,

1 Your Honor. I am talking about the non-games

2 --

3 JUDGE SIPPEL: Where these guys

4 sit there in --

5 MR. SCHONMAN: -- the background,

6 the talking heads, the historical footage.

7 BY MR. SCHONMAN:

8 Q Although it is available from a

9 lot of different places, and it has been

10 licensed for years, and you can view it here

11 and there and broadcast for free, whatever,

12 the fact that it is being packaged on one

13 channel, does that give it value?

14 A It gives it value, but I was

15 looking at it from the -- is it worth being

16 the [REDACTED] most expensive network in the

17 industry?

18 Q Well, without regard to how much

19 --

20 JUDGE SIPPEL: Wait. Which

21 industry are you talking about?

22 THE WITNESS: The cable industry.

1 JUDGE SIPPEL: Say that again.

2 The [REDACTED] --

3 THE WITNESS: At [REDACTED], or [REDACTED]
[REDACTED], it is the [REDACTED] most expensive cable
5 network.

6 JUDGE SIPPEL: In the industry.

7 THE WITNESS: In the industry.

8 JUDGE SIPPEL: We did that about
9 ESPN, all that kind of stuff --

10 THE WITNESS: Right.

11 JUDGE SIPPEL: -- off the chart.
12 I am with you. Go ahead.

13 BY MR. SCHONMAN:

14 Q Is it fair to say that it gives it
15 some value at least? It may not boost it up
16 to a certain level, but you have discounted
17 it, as I understand it, because you said it
18 was available at all these other outlets. And
19 my question goes to whether it has any value
20 at all. Is there some value that you place on
21 it?

22 A I do. I just didn't quantify how

1 much of that is for the fact that they -- they
2 do clearly carry 24 hours of content.

3 JUDGE SIPPEL: What does, the NFL?

4 THE WITNESS: The NFL Network
5 does.

6 JUDGE SIPPEL: It is on 24 hours a
7 day?

8 THE WITNESS: Yes, it is.

9 JUDGE SIPPEL: And they talk all
10 that time?

11 THE WITNESS: Well, I think what
12 they do is they repeat the programs a lot,
13 but, yes, they do -- they do talk 24 hours a
14 day.

15 JUDGE SIPPEL: Well, does that
16 count for being on for 24 hours when you
17 repeat stuff?

18 THE WITNESS: Are you asking me?

19 JUDGE SIPPEL: Yes. Yes.

20 THE WITNESS: Yes. I mean, it
21 does count. I mean, you are on 24 hours, you
22 are repeating the programs. I mean, it is

1 what it is.

2 JUDGE SIPPEL: All right. I agree

3 it is what it is, but okay.

4 BY MR. SCHONMAN:

5 Q I am not going to cover all the
6 factors. I think the fourth factor -- and I
7 am skipping the third -- that you had
8 indicated that the NFL Network charges too
9 much, because -- in your belief, because the
10 network did not target underserved
11 demographics.

12 A That is correct.

13 Q And the demographics that it is
14 intended to reach, as I understand it, is the
15 male 18 through 49 age group?

16 A Correct.

17 Q In your professional view, what is
18 the most important demographic for reaching
19 advertisers? I'm sorry, not for reaching
20 advertisers, the most important demographic
21 that advertisers are interested in.

22 A That actually varies from

1 advertiser to advertiser. I mean, if you are
2 -- you know, if you are selling diapers, you
3 are probably looking for moms or parents. If
4 you are selling toys, you are looking to reach
5 pre-teens. So it will vary by advertiser.

6 I think what I am trying to say in
7 this context is the 18 to 49 male demographic
8 is actually, in terms of television,
9 relatively is valuable to advertisers.
10 Because it is valuable to advertisers, you
11 have a lot of networks who are already
12 targeting that demographic. I mean, it is a
13 popular target. And because advertisers value
14 it, you have a lot of networks chasing that
15 demo.

16 So if you are a cable operator,
17 and they have been adding channels now for 20
18 or 30 years, you are looking at, you know,
19 what is -- at this point, if you look at the
20 kinds of channels that they have been adding
21 in recent years, they have been foreign
22 language channels, which have historically

1 been undeserved, more minority programming,
2 gay and lesbian channels, channels geared to
3 specific interests.

4 They have been going after where
5 their underserved viewers and subscribers are.
6 That is typically what we have seen added over
7 the last few years. This is not an undeserved
8 demographic.

9 JUDGE SIPPEL: All right. That is
10 it. That is it. I mean, the ball has not
11 been advanced one yard on this. We have been
12 over this stuff over and over and over again.
13 I mean, are you trying to bring out something
14 new? I am not trying to argue with you, but
15 we have got a time problem here.

16 MR. SCHONMAN: I understand. I am
17 trying to get clarification. I mean, I don't
18 have --

19 JUDGE SIPPEL: It is pretty clear
20 what he is testifying to. I am arguing with
21 you. That is what I -- go ahead.

22 MR. SCHONMAN: All right.

1 JUDGE SIPPEL: Finish your line of
2 questioning, but please, please move it.

3 MR. SCHONMAN: I am trying.

4 BY MR. SCHONMAN:

5 Q I understand that it is -- your
6 position is that it is underserved -- it
7 doesn't serve an undeserved demographic group.
8 Are you saying that the 18 through 49 male
9 group is saturated?

10 JUDGE SIPPEL: Saturated with
11 what?

12 MR. SCHONMAN: Saturated with
13 programming that is intended to reach that
14 audience.

15 JUDGE SIPPEL: Can you answer that
16 question? Seriously. Saturated? I mean, if
17 you --

18 THE WITNESS: The airwaves are
19 saturated with programming. Whether we have
20 reached a point at which no new programming
21 could reach, you know -- I mean, I am a
22 technical analyst. I could break that down,

1 you know, for a couple of hours, if we are
2 trying to get to something.

3 JUDGE SIPPEL: Great.

4 (Laughter.)

5 THE WITNESS: I don't think that
6 is what -- I don't think that is what His
7 Honor wishes. We are -- I would say there is
8 a -- if you just look -- and I have got data
9 in my report that speaks directly to the
10 number of networks that skew to the -- not
11 only the 18 to 49 demographic but also the
12 male 18 to 49 demographic.

13 And there is a disproportionate
14 number that skew in that direction, because it
15 is a -- it is a valued demographic to
16 advertisers. So a lot of networks --

17 JUDGE SIPPEL: Okay. I think you
18 have said enough.

19 THE WITNESS: Okay.

20 JUDGE SIPPEL: That is it. Next
21 witness? Anybody have anything more of this
22 man?

1 MR. TOSCANO: Nothing further.

2 JUDGE SIPPEL: Okay. Next
3 witness? You are excused, sir. Thank you
4 very much.

5 (Whereupon, the witness was
6 excused.)

7 MR. CARROLL: Your Honor, my
8 colleague, Mr. Perez, will handle the next
9 witness for Comcast.

10 JUDGE SIPPEL: Yes.

11 MR. CARROLL: He is right here.
12 We are all set.

13 JUDGE SIPPEL: All right.

14 MR. CARROLL: With any luck, Your
15 Honor, we will have about a 10-minute direct.
16 That is it.

17 JUDGE SIPPEL: Well, the directs
18 aren't -- everybody that is on direct is a
19 hero here, but it is the -- cross is tough, I
20 know it is tough, and you are not even getting
21 any objections. I mean, that is why I thought
22 it was going to move it a little bit quicker.

1 I am not making any ruling, by the
2 way, on that witness' expert capabilities. I
3 am going to let you brief that in the proposed
4 findings.

5 MR. SCHMIDT: Thank you, Your
6 Honor.

7 JUDGE SIPPEL: Could you raise
8 your right hand, please?

9 WHEREUPON,

10 JEFF SHELL
11 was called as a witness by Counsel for Comcast
12 Cable Communications, LLC, and having been
13 first duly sworn, assumed the witness stand,
14 was examined and testified as follows:

15 JUDGE SIPPEL: Be seated, sir.

16 MR. PEREZ-MARQUES: Your Honor,
17 may I approach to show the witness --

18 JUDGE SIPPEL: Surely, you may.

19 DIRECT EXAMINATION

20 BY MR. PEREZ-MARQUES:

21 Q Good morning, Mr. Shell.

22 A Good morning.

1 Q I am showing you what has been
2 marked as Comcast Exhibit 22, which is a copy
3 of your written direct testimony.

4 JUDGE SIPPEL: This is already in?

5 MR. PEREZ-MARQUES: It is. That
6 is correct.

7 JUDGE SIPPEL: Thank you.

8 BY MR. PEREZ-MARQUES:

9 Q Are you familiar with this
10 document?

11 A I am, yes.

12 Q Did you sign it, and do you stand
13 by its contents?

14 A I do.

15 Q Mr. Shell, what is your position
16 with Comcast?

17 A I am currently President of the
18 Programming Division.

19 Q The Programming Division being the
20 part of Comcast that oversees the networks it
21 owns?

22 A Yes.

1 Q And those networks include Golf
2 and Versus, two of the networks we have been
3 discussing in this proceeding, is that right?

4 A That is correct, yes.

5 Q When were Golf and Versus
6 launched?

7 A I wasn't at Comcast when they were
8 launched, but I believe Golf was launched
9 around 1995, and I believe Versus, which was
10 previously called OLN and the Outdoor Life
11 Network, was launched around 1997 or 1998.

12 Q And was the cable environment then
13 the same as it is now?

14 A No.

15 Q In what respect is it different?

16 A Back in the '90s, there was no
17 digital cable or digital cable was just
18 starting. And so, really, everything was
19 analog cable, and there was in most respects
20 plenty of bandwidth. So when a cable operator
21 was trying to decide whether to launch a
22 channel, it was really just about the price